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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

ZONNIE WEAVER,

Petitioner,

v.

CHARLIE JONES,
Warden of Holman Prison,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner was denied his constitutional right to effective counsel because counsel's joint representation of petitioner and petitioner's co-defendant created an actual conflict of interest that prevented counsel from raising petitioner's most compelling argument on appeal: that petitioner was convicted on constitutionally insufficient evidence.

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Appendix E — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Motion For A Certificate Of Appealability Dated And Filed February 13, 2003 ..... 61a

Petitioner Zonnie Weaver respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The Orders entered by the United States Court of Appeals for the Eleventh Circuit denying a certificate of appealability on December 20, 2002, and denying motion for reconsideration on February 13, 2003, are attached as Appendices A and B. The Orders entered by the United States District Court for the Southern District of Alabama denying petition for writ of habeas corpus on September 17, 2002, and denying a certificate of appealability on October 22, 2002, are attached as Appendices C and D. The Report and Recommendation of the Magistrate Judge for the District Court for the Southern District of Alabama on July 23, 2002, is attached as Appendix E.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its judgment on December 20, 2002, and denied rehearing on February 13, 2003 (Appendices A and B). Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

This case also involves application of 28 U.S.C. § 2241, which provides in pertinent part: "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." This case may also invoke 28 U.S.C. § 2253, which provides in pertinent part that a "certificate of appealability may issue . . . if applicant has made a substantial showing of the denial of a constitutional right."

STATEMENT OF THE CASE

This case presents an extraordinary example of a defendant being denied his right to counsel due to appellate counsel's conflict of interest. Petitioner Zonnie Weaver — who previously had never been convicted of a violent offense — is serving a life sentence without parole for the supposed burglary of a trailer. During this incident, petitioner and his brothers were shot, one brother fatally, by the State's star witness, who was arrested for murder, but never prosecuted. As a matter of fact and law, petitioner is *innocent* of the crime. Indeed, petitioner was no more than a bystander to what the arresting police officer later called a drug deal gone wrong.

Under Alabama law, two of the required elements of a burglary charge are that the defendant be armed with a weapon and that he have intent to commit a felony. The State never accused petitioner of having a weapon during the event in question; indeed, its witnesses indicated that he did not have one. Nor did the State introduce any evidence relevant to petitioner's intent. Under any interpretation of the law, this is *not* a burglary.

Despite the absence of evidence against petitioner, petitioner's trial counsel did nothing to point out the failure of the State's case at trial. Counsel did not ask a single question of a witness nor make a single objection to the State's questions. He did not file motions of any kind, nor even submit jury instructions.

After petitioner and his brother were convicted, trial counsel for petitioner's brother and co-defendant, Robert Clark, represented both petitioner and his co-defendant on appeal. This dual representation created an actual conflict of interest that prevented attorney Clark from raising the most basic — and clearly the most compelling — claim on appeal: that insufficient evidence existed to support petitioner's conviction. Unlike petitioner, the State had actually accused his brother Mark of being the primary instigator in the alleged burglary, but presented no such evidence against petitioner. Because attorney Clark could not assert these insufficiency claims for petitioner without potentially implicating petitioner's co-defendant, he dropped them altogether.

There is no question that attorney Clark knew that petitioner's and his co-defendants' interests were at odds. Indeed, at trial, this conflict resulted in petitioner *turning down a joint three year plea bargain* that his brother (and attorney Clark) desperately wanted to accept. But instead of providing the undivided loyalty guaranteed by the Constitution, Clark sacrificed both of his clients and forfeited petitioner's significant chances for a reversal on appeal. Had petitioner's appellate counsel raised the insufficiency of the evidence against petitioner, he would have been exonerated.

STATEMENT OF FACTS

On February 17, 1996, petitioner drove his brothers Ammon and Mark to Citronelle, Alabama, so that Ammon could purchase crack from Cedric (also known as "Sedrick") James ("James") and Fred Kelly ("Kelly"). TT at 97.[1] Both Ammon and Mark previously had purchased crack from James and Kelly; and all knew each other by name. HT at 9; Aff. 3 at 1. Ammon owed James and Kelly money for prior drug purchases. Aff. 3 at 1.

After arriving at Road Street in Citronelle, Ammon purchased what he thought was crack from James and Kelly. TT at 103. Petitioner drove his truck a short distance; and Ammon tried the crack. TT at 104. Upon realizing that the crack was fake, Ammon told petitioner to circle the truck back around the trailer. TT at 104. Ammon walked up to the trailer into which he and Mark had been invited by James and Kelly several times in the past. Aff. 1 at 2. As always, the door of the trailer was open. HT at 28; Aff. 1 at 2. Petitioner and Mark waited for Ammon inside petitioner's truck. HT at 27.

After a few minutes, Mark got out of the truck and walked towards the trailer to check on Ammon. TT at 105. As he got closer, he could hear Ammon inside the trailer, telling James that he wanted something for his money. HT at 28.

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1. The following abbreviations will be used: Trial transcript ("TT"); Rule 32 hearing transcript ("HT"); Affidavits 1-7 ("Aff."), attached to Petitioner's Application for Certificate of Appealability, October 17, 2002; Petitioner's Medical Records ("M.R."), attached as Exhibit A to the Affidavit of Marshall M. Searcy, October 17, 2002; and the Magistrate Judge's Report and Recommendation ("Rpt."), July 23, 2002.

The argument grew more heated and a fight ensued. HT at 28. As Mark walked up the steps toward the door, it is undisputed that someone standing behind the doorway hit him in the face, and Mark fell back. TT at 105. At that point, Ammon crawled from the trailer and yelled to his brothers that he had been shot. HT at 29.

Only when Ammon emerged from the trailer did petitioner get out of his truck to help Mark carry Ammon towards the truck. HT at 30. Kelly appeared from behind the trailer holding a shotgun and yelled at Ammon, who was still being held by his brothers. HT at 30. Kelly fired his shotgun, hitting Ammon in the chest. TT at 107. The shotgun blast also struck petitioner in the wrist and Mark in the buttock. TT at 107; M.R.

The police arrived within moments to find petitioner and Mark still trying to carry Ammon to petitioner's truck. TT at 107. Ammon was declared dead at the scene. HT at 32. The Citronelle police located the shotgun that Kelly had hidden behind the trailer, but *did not recover any knife*, though the State later argued that a knife was used in the alleged burglary. TT at 262. The police arrested Kelly for murder, Aff. 6 at 2, and petitioner and Mark for assault. HT at 21. Although Kelly was never prosecuted, the assault charges against petitioner and Mark were amended to burglary charges as a result of pressure from Kelly's family. Aff. 6 at 2.

Prior to trial, petitioner's counsel, Ed Tibbetts, met with petitioner four or five times for approximately twenty minutes each time. RT at 7. Petitioner testified that around twenty people witnessed the altercation at Kelly's trailer, RT at 24, but trial counsel inexplicably did not attempt to locate any

of those witnesses. These witnesses would have supported petitioner's account of the incident. RT at 14. Moreover, counsel failed to obtain petitioner's medical records, which would have also corroborated petitioner's account of the incident.

After a joint trial, both petitioner and Mark were convicted of first degree burglary in the Circuit Court for the County of Mobile, Alabama. TT at 359-60. Later, James would brag to his friends that he and his uncle had gotten away with murder. Aff. 7 at 1-2.

REASONS FOR GRANTING THE WRIT

I. Had Petitioner Been Represented By Effective Appellate Counsel, His Conviction Would Have Been Overturned

The District Court determined that petitioner's claim of ineffective assistance of appellate counsel was procedurally defaulted because petitioner did not raise the conflict of interest issue in his Rule 32 petition in state court. Alternatively, in a footnote, the Court found this claim lacking on the merits. The Eleventh Circuit declined to issue a certificate of appealability, and denied rehearing. The District Court's and the Eleventh Circuit's decisions were contrary to the law as established by this Court.

A. There Was Insufficient Evidence At Trial To Support Petitioner's Conviction For First Degree Burglary

A petitioner is entitled to habeas relief if, after viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found proof of the petitioner's guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979).

Here, the State did not submit evidence sufficient to support petitioner's conviction for first degree burglary.[2] Ala. Code § 13A-7-5. To commit first degree burglary, a person must knowingly and unlawfully enter a dwelling with the intent to commit a crime, here assault in the first degree. At trial, the State adduced *no evidence* showing beyond a reasonable doubt that petitioner entered Kelly's trailer with any sort of unlawful intent. Instead, the evidence offered by the State shows that petitioner did little more than drive his brothers to the scene of the alleged burglary. RT at 30, 41, 108. The State's case against petitioner was based almost exclusively on the testimony of James, a notorious drug dealer, and Kelly, the man who shot petitioner and his brothers. James, the only witness who placed petitioner inside the trailer, testified that petitioner "wasn't really doing nothing but trying to keep somebody else from helping me." TT at 162. This testimony is virtually the entirety of the State's burglary case against petitioner, and falls far short of proof beyond a reasonable doubt.

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2. For a more comprehensive discussion of petitioner's insufficiency of the evidence claim, see Zonnie Weaver's Petition for Writ of Habeas Corpus, filed August 14, 2001, at 151.

In addition, for a first degree burglary, the person or another participant must be armed with a deadly weapon used either in effecting the entry, while in the dwelling, or in immediate flight of the dwelling. Nevertheless, the State failed to produce *any weapon* much less one supposedly belonging to or brandished by petitioner. Furthermore, eyewitnesses inside the trailer that night did not identify petitioner as carrying a knife. TT at 196, 215, 262.

Absent any evidence that petitioner himself formed the requisite intent or had a weapon, the jury's verdict could stand, if at all, only upon on an accomplice theory. But mere presence at the scene of a crime — where petitioner "wasn't really doing nothing" — does not rise to the level of aiding and abetting a burglary or even an assault. *See Radke v. State*, 292 Ala. 290, 293 So. 2d 314 (Ala. 1974). Therefore, petitioner's conviction currently rests on constitutionally insufficient evidence.

Despite the dearth of evidence against petitioner, trial counsel was virtually silent during petitioner's trial. Counsel did not present a single witness for the defense; he did not cross-examine any of the prosecution's witnesses. In fact, Tibbetts spoke only twice during the entire trial, when he made a cursory opening statement and brief closing remarks. Petitioner's counsel conducted no pretrial investigation, and inexplicably did not attempt to locate any of the 20 witnesses who his client said would support his account of the incident. RT at 14; 24. Moreover, Tibbetts also failed to obtain petitioner's medical records before trial, which would have shown that petitioner and his brother were shot from behind, and not as Kelly testified, as they advanced upon him.

B. Petitioner's Appellate Counsel Had An Actual Conflict of Interest That Prevented Him From Rendering Effective Assistance

To make matters much worse, petitioner's counsel, Clark, labored under an actual conflict of interest in representing both petitioner and his brother Mark on appeal. Clark had represented Mark at trial. During the trial, Mark was alleged to have been the primary instigator in the burglary; in contrast, petitioner was essentially accused of standing by. Because the State offered virtually *no evidence* that petitioner was involved in the alleged burglary, it was in petitioner's interest to cast blame on his brother and highlight the differences in the State's evidence. However, due to this conflict, Clark did not raise compelling arguments on petitioner's behalf during direct appeal. Both brothers had arguments based upon the insufficiency of the evidence, but attorney Clark obviously felt he could not make specific references to the complete lack of evidence against petitioner without violating his duty of loyalty to petitioner's brother. Instead, petitioner's counsel raised only one issue on appeal: the trial court's unexceptional statement that a person who feels cheated in a drug deal is not privileged to enter the residence of another.

The constitutional right to counsel extends to a criminal defendant's first appeal of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1993). To demonstrate constitutionally deficient representation by appellate counsel, a petitioner must show that his performance "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel has rendered ineffective assistance if an actual conflict of interest adversely affects his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). A conflict of interest arises if appellate counsel

"actively represented conflicting interests" and this conflict "adversely affected his [] performance." *Cuyler*, 446 U.S. at 349-50; *see also Glasser v. United States*, 315 U.S. 60, 72-75 (1942) (conviction overturned where defense counsel's "struggle to serve two masters [could not] seriously be doubted").

Here, Clark did not challenge the evidence on appeal, although it was essential to an effective appeal on petitioner's behalf to argue that the evidence against petitioner was constitutionally insufficient to support his burglary conviction. "Where . . . appellate counsel fails to raise a claim on appeal that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so." *Eagle v. Linahan*, 279 F.3d 926, 943 (11th Cir. 2001); *Schultz v. State*, 481 So. 2d 456, 459 (Ala. Crim. App. 1985) (citation omitted) (Counsel has an actual conflict of interest if the "introduction of probative evidence or plausible arguments that would significantly benefit one defendant, would damage the defense of another defendant who the same counsel is representing.").

There is no question that Clark recognized the actual conflict of interest between petitioner and his brother before he undertook the joint representation. The conflict manifested itself at the trial level as well, when the prosecutor offered a contingent, joint plea to petitioner and his brother. RT at 128. Although petitioner's brother wanted to accept the offer, petitioner did not. RT at 46-47. According to his own testimony, Clark admitted that this made him very angry with petitioner, going so far as to become "very profane with [petitioner] . . . in saying — in questioning his intelligence level to say the least." RT at 101-02.

Indeed, in a case strikingly similar to the present one, *Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001) (applying the standard articulated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980)), the Eleventh Circuit held that counsel's joint representation of co-defendants post-trial created an actual conflict of interest which deprived the defendants of their constitutional rights to counsel. In light of this precedent, and the virtually indistinguishable facts of petitioner's case, Clark's representation of petitioner on appeal was constitutionally ineffective. Under this Court's decision in *Cuyler*, and the Eleventh Circuit's recent application of this precedent, the Eleventh Circuit erred in failing to apply its own precedent based upon *Cuyler* here.

C. Petitioner's Claim of Ineffective Assistance of Appellate Counsel Based on Conflict of Interest is Not Procedurally Defaulted

The District Court concluded that petitioner did not raise "*all of the instances*" of ineffective assistance of counsel in state court before raising them in federal court. Rpt. at 28, & 15.

However, petitioner *did* raise a claim of ineffective assistance of appellate counsel in his Rule 32 petition.[3] Further, an actual conflict of interest is not an "instance" of ineffective assistance of counsel; it violates the very essence of loyal and effective legal representation. Therefore, petitioner has preserved the issue of ineffective assistance of his appellate counsel for federal review.

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3. *See* Petitioner's Rule 32 Petition at 133.

Even if the Court finds that the conflict of interest claim was procedurally defaulted, petitioner can escape procedural default by showing cause and prejudice. *Murray v. Carrier*, 477 U.S. 478 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel" can constitute cause for purposes of excusing procedural default. *Id.* at 488.

Here, petitioner can show cause because the legal basis for his claim of conflict of interest was decided *two years after* his state court Rule 32 petition was filed. *See Reynolds v. Chapman*, 253 F.3d 1337 (11th Cir. 2001). At the time petitioner's Rule 32 petition was filed, there was no Eleventh Circuit case law on point, and therefore, this claim was not "reasonably available" to petitioner's counsel. *Murray*, 477 U.S. at 488. Petitioner also can show that "actual prejudice" would result from a failure to hear this claim because the *Reynolds* decision compels a finding that petitioner's appellate counsel had an actual conflict of interest.

Further, petitioner can avoid procedural default based on the "fundamental miscarriage of justice" exception because he can make a (more than) colorable showing of *actual innocence*. *See Schlup v. Delo*, 513 U.S. 298 (1995). As noted above, petitioner's conviction currently rests on insufficient evidence. In fact, the State's evidence was so flimsy that, during trial, the State offered a three year plea bargain. But despite the weaknesses of the State's case, trial counsel did not adduce evidence at trial to further contradict the State's witnesses[4]

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4. Moreover, counsel for petitioner failed to point out that all of petitioner's four prior offenses, which formed the basis for his sentence of life imprisonment without parole, were non-violent and

(Cont'd)

Accordingly, the District Court and Eleventh Circuit erred in concluding that petitioner's claim was procedurally defaulted.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioner respectfully requests that his petition for writ of certiorari be granted, and the judgment of the United States District Court denying petitioner's petition for writ of habeas corpus be vacated. In the alternative, petitioner respectfully requests that his petition for writ of certiorari be granted and the order of the Eleventh Circuit Court of Appeals denying a certificate of appealability be vacated and petitioner's petition for writ of habeas corpus be considered on the merits.

Respectfully submitted,

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(Cont'd)

occurred more than ten years prior to his trial. Petitioner's prior convictions are for burglary in the second degree, Ala. Code § 13A-7-6(b), receiving property in the second degree, Ala. Code § 13A-8-18, burglary in the third degree, Ala. Code § 13A-7-7, and possession of a forged instrument in the second degree, Ala. Code § 13A-9-6. *See* TT at 373-75. Petitioner's convictions occurred between 1982 and 1986.

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 20, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15844-C

ZONNIE WEAVER,

Petitioner-Appellant,

versus

CHARLIE JONES,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

/s/ Gerald B. Tjoflat
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED OCTOBER 22, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CASE NO. 01-0577-BH-C

ZONNIE WEAVER,

Petitioner,

v.

GRANTT CULLIVER, etc.,

Respondent.

ORDER

This matter is before the Court on Petitioner's Application (Doc. 24) for a Certificate of Appealability. Though it appears that the Petitioner's notice (Doc. 23) of appeal was filed untimely, the Court will consider Petitioner's application.[1] For the reasons stated below, the Court **hereby**

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1. Federal Rule of Appellate Procedure 4(a)(1)(A) provides that a notice of appeal "must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." The Court's judgment (Doc. 22) denying Petitioner's a writ of habeas

(Con'd)

Appendix B

ORDERS that the Petitioner's Application (Doc. 24) for a Certificate of Appealability **be DENIED.**

Title 28, U.S.C., Section 2253(c)(1) (2002) provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

District judges may also issue certificates of appealability under § 2253. Fed.R.App.P. 22(b) (including district judges in the list of officers who can issue certificates of appealability); *see also Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996) (*en banc*) (district court judges are included in the language "circuit justice or judge" and are therefore authorized to issue certificates of appealability under 28 U.S.C. § 2253).

(Con'd)

corpus was entered on September 17, 2002, and the notice (Doc. 23) of appeal was filed on October 18, 2002, 31 days later. The Court notes that since Petitioner's notice of appeal was filed by "free-world" counsel, Petitioner is not entitled to the prison mailbox rule embodied in Fed. R. App. P. 4(c).

Appendix B

Section 2253(c)(2) provides that a court may issue a certificate of appealability only if the applicant has made "a substantial showing of the denial of a constitutional right." This language resembles the pre-1996[2] standard for issuing certificates of probable cause, where the court looked to see if the petitioner had made a "substantial showing of the denial of a federal right" *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). Because the language of the pre- and post-1996 standards are so close, the Eleventh Circuit had concluded "that the standard governing certificates of probable cause and certificates of appealability is materially identical," *Hardwick v. Singletary,* 126 F.3d 1312, 1313 (11th Cir. 1997), and that "[c]ertificates of probable cause are the prior equivalent of certificates of appealability," *Ford v. Haley*, 179 F.3d 1342, 1346 (11th Cir. 1999). Thus, the Court looks to the case law on when to grant a certificate of probable cause. The Supreme Court explained: to make a substantial showing of the denial of a federal right, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Barefoot*, 463 U.S. at 893 n.4., *quoting Gordon v. Willis,* 516 F.Supp. 911, 913 (N.D. Ga. 1980).

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2. The Antiterrorist and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996), became effective on April 24, 1996, and altered the procedures for habeas corpus appeals.

Appendix B

Based on careful consideration of the record, the Court finds that Petitioner has not demonstrated that the issues in this action are debatable among reasonable jurists, that a court could resolve these issues in a different manner, or that they deserve encouragement to proceed further. The court concludes that Petitioner has not made "a substantial showing of the denial of a constitutional right," and, thus, that the Petitioner's Application (Doc. 24) for a Certificate of Appealability be and is **due to be DENIED.**

SO ORDERED this 22nd day of October, 2002

s/ W.B. Hand
SENIOR DISTRICT JUDGE

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED AND FILED SEPTEMBER 17, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION 01-0577-BH-C

ZONNIE WEAVER

Petitioner,

versus

CHARLIE E. JONES,
Warden of Holman Prison,

Respondent.

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Recommendation to which objection is made, the Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is ADOPTED as the opinion of this Court. It is ORDERED that petitioner's petition for habeas corpus relief is hereby DENIED.

Appendix C

DONE this 17 day of Sept., 2002.

s/ W.B. Hand
SENIOR DISTRICT JUDGE

APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED JULY 23, 2002 AND FILED JULY 24, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION 01-0577-BH-C

ZONNIE WEAVER,

Petitioner,

v.

CHARLIE E. JONES,
Warden of Holman Prison,

Respondent.

REPORT AND RECOMMENDATION

Zonnie Weaver, a state prisoner currently in the custody of respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Weaver challenges the validity of his conviction in 1997 by a jury in the Circuit Court of Mobile County, Alabama, on the charge of first degree burglary for which Weaver received a sentence of life imprisonment without the possibility of parole under the Habitual Felony Offender Act. (Doc. 7 at 4, habeas petition).

Appendix D

This matter is now before the Court on Weaver's petition and brief respondent's answer, court records, and briefs on appeal.[1]

FINDINGS OF FACT

1. On the evening of February 17, 1996, Zonnie Weaver drove his brothers Mark and Ammon Weaver to Road Street in Citronelle, Alabama, so that his brothers could purchase crack cocaine. (Doc. 12, Respondent's Answer, Ex. 1 at 243, trial transcript; Doc. 7 at 2, habeas petition).[2] Upon arrival at Road Street, Mark and Ammon Weaver got out of the truck and purchased drugs from two males while Zonnie drove around the block. (Doc. 12, Ex. 1 at 243, trial transcript).

2. Christy Cole ("Cole") and her boyfriend Bruce Brooks ("Brooks") were chopping firewood outside their house on Road Street and witnessed the drug transaction.[3] (*Id.* at 240-43).

---

1. Following a careful review of the record and exhibits, the undersigned Magistrate Judge has concluded that there are sufficient facts and information upon which the issues under consideration may be properly resolved. Therefore, no evidentiary hearing is required upon the issues. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11 (1992).

2. Unless otherwise stated, reference to "exhibits" in this opinion refers to exhibits to Respondent's Answer.

3. The area near the street light on Road Street, located outside Cole's house, was well known for drug dealing. (Doc. 12, Respondent's Answer, Ex. 1 at 249-53, 263, trial transcript). According to Cole, Mark Weaver was the one with the money, and he made the buy from two dealers whom Cole knew as "Slim" and "Funk." (*Id.* at 251, 257). That night, Slim was wearing a "starter jacket" with "Georgetown" written across the back of it. (*Id.*).

Cole observed Zonnie Weaver return in the truck, and he and his brothers left. (*Id.* at 243).

3. Shortly thereafter, Cole heard a noise and saw Mark and Ammon Weaver standing at the corner of her house. (*Id.* at 243). Mark Weaver asked Cole's boyfriend, Brooks, where "the guys" had gone, referring to the two males who had sold them drugs.[4] (*Id.* at 244-45, 254). Brooks told him that he thought they had gone down the street. (*Id.* at 244). Mark Weaver put a knife to Brooks' throat and threatened to "take [his] fucking head off" (*Id.* at 244). Brooks yelled to Cole to go and call the police, and Cole ran to the trailer next door to use the telephone. (*Id.* at 245, 254). According to Cole, Zonnie Weaver drove up in the truck at that time, saw her running toward the trailer, and yelled to his brothers, "there goes one of the little motherfuckers there." (*Id.* at 254). Mark and Ammon dropped Brooks, and the three brothers pursued Cole. (*Id.* at 254).

4. In the trailer next door were Fred Kelly ("Kelly"), his wife, Kathy Kelly, their nephew Cedric James ("James"), and five children. (*Id.* at 112, 114-115). When Cole knocked on the door and asked to use the telephone, James was talking on the telephone, holding his nine-month-old baby in his lap. (*Id.* at 118, 170, 188, 230-31, 246-47). Frightened, Cole told them to "shut the door and lock it." (*Id.* at 170, 188).

5. Within approximately three to five minutes after Cole's arrival, the Weaver brothers opened the door and

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4. It is undisputed that the drug dealers had sold Mark and Ammon Weaver fake crack cocaine. (Doc. 7 at 2, habeas petition).

entered the trailer.[5] (*Id.* at 121, 145, 156-59, 212, 255). Seeing Kelly, one of the Weaver brothers said: "[t]hat's him." (*Id.* at 213). Disagreeing, another brother replied: "no," "he was lighter skin[ned]." (*Id.*). The Weavers then turned their attention to James and stated: "that's him right there."[6] (*Id.* at 160, 190, 213-15).

6. Mrs. Kelly observed that one of the Weavers had a knife, and she began trying to get the children out of the trailer. (*Id.* at 118-19).

7. According to James, Mark Weaver pulled the knife, and a fight ensued between James and Ammon and Mark Weaver, while Zonnie Weaver stood nearby preventing anyone from helping James. (*Id.* at 133-34, 140, 145-46, 161-62). Mark Weaver stabbed James once in the leg and once in the stomach. (*Id.* at 163, 165).

8. When the fight began, Kelly left the living room and retrieved a gun located in his bedroom at the other end of the trailer. (*Id.* at 213-16). He loaded the gun with one buck shot shell and returned to the living room. (*Id.* at 216). By the time he returned, the fight had moved to the hallway at the other end of the trailer, and, according to Kelly, he did

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5. James testified that the Weavers "snatched" the door open and entered. (Doc. 12, Ex. 1 at 159, trial transcript). Cole testified that they "yanked"the door open and all came in. (*Id.* at 247). The Kellys testified that the Weavers did not knock and did not have permission to enter their home. (*Id.* at 124, 212, 222).

6. James was wearing a "starter jacket" with "Michigan" written on it. (*Id.* at 164-65, 258).

not fire because his wife and children were in that area. (*Id.* at 216, 236).

9. James eventually retreated to a bathroom occupied by one of the children, and the Weaver brothers left. (*Id.* at 165). As they left, James heard them say "he was the wrong one." (*Id.* at 165).

10. When Kelly observed the Weavers coming back up the hallway, he went outside and hid behind the door. (*Id.* at 216-17).

11. Realizing only after the Weavers had left that he had been stabbed, James grabbed a pellet gun resting beside the front door, ran outside, and hit Mark Weaver in the back of the head with the gun. (*Id.* at 166, 197-98). Mark dropped the knife, and Ammon picked it up and ran after James, who retreated back into the trailer. (*Id.* at 166). The Weavers then began to walk away again. (*Id.* at 217).

12. Undetected behind the door, Kelly yelled to the Weavers: "I ought to shoot the hell out of all three of [you]." (*Id.* at 217). Hearing this remark, the Weavers turned around and walked back toward Kelly, Ammon Weaver holding the knife. (*Id.* at 218, 234-35, 238). As they approached, Kelly repeated: "[a]ll right now," but they kept coming. (*Id.* at 218). Kelly fired a shot, killing Ammon Weaver and injuring Mark and Zonnie. (*Id.* at 195-96, 218-19). Kelly then hid the gun under a piece of tin behind the trailer and ran to the end of his fence row and waited. (*Id.* at 218). Seeing a police car approaching, Kelly flagged it down and told the officer that he "had shot some boys up there." (*Id.* at 218, 260, 262).

13. Zonnie and Mark Weaver were transported to the hospital for treatment and then were taken to the police station for questioning where they were later arrested on assault charges.[7] (Doc. 7 at 7, habeas petition). The assault charges were later changed to first degree burglary. (*Id.* at 9). On April 15, 1996, a grand jury indicted Zonnie and Mark Weaver on charges of first degree burglary. (Doc. 12, Ex. 5 at 180, Case Action Summary).

14. On July 18, 1996, court-appointed attorney Ed Tibbetts appeared for Zonnie Weaver. (*Id.*). Attorney Robert Clark represented Mark Weaver. (*Id.* at 1, Case Action Summary). The state circuit court consolidated Zonnie and Mark Weaver's cases for trial, and, on June 24, 1997, following the presentation of evidence, closing arguments, the court's oral charge, and jury deliberation, a jury found them guilty of first degree burglary under *Alabama Code* § 13A-7-5. (Doc. 7 at 17, habeas petition; Doc. 12, Ex. 5 at 3, 182, Case Action Summaries). On June 26, 1997, both Zonnie and Mark Weaver were sentenced to life in prison without the possibility of parole under the Habitual Felony Offender Act. (Doc. 12, Ex. 5 at 3, 182, Case Action Summaries).

15. On that same date, Zonnie and Mark Weaver gave oral notice of appeal of their convictions and sentences to the Alabama Court of Criminal Appeals. (*Id.* at 182). They were represented on appeal jointly by Mark Weaver's trial counsel, Robert Clark. (*Id.* at 4, 183). In that appeal,

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7. According to petitioner, Fred Kelly was charged with murder in the death of Ammon Weaver, but a grand jury failed to indict him. (Doc. 7 at 8, habeas petition).

the Weavers raised only one issue: whether the trial court impermissibly commented on the evidence during its oral charge to the jury by stating that "the law does not give a person who feels cheated in a drug transaction any permission, right or justification to enter uninvited into the dwelling of any other person for any purpose." (Doc. 12, Ex 1 at 342, trial transcript).

16. On January 30, 1998, the Alabama Court of Criminal Appeals affirmed the Weavers' convictions and sentences, and, on March 6, 1998, the court overruled their application for rehearing. (Doc. 12, Ex. 4 at 3, Order; Doc. 7 at 18, habeas petition). The Alabama Supreme Court denied their petition for a writ of certiorari on June 26, 1998. *Ex parte Weaver*, 733 So. 2d 496 (Ala. 1998) (table).

17 On June 14, 1999, Zonnie Weaver filed a petition in Mobile County Circuit Court under Rule 32 of the *Alabama Rules of Criminal Procedure*, seeking collateral relief from conviction and sentence. (Doc. 12, Ex. 5 at 184, Case Action Summary). In the Rule 32 petition, Weaver raised multiple issues related to ineffective assistance of trial and appellate counsel and trial court errors. (Doc. 12, Ex. 5 at 201-329, Rule 32 petition). On March 3, 2000, the state circuit court conducted an evidentiary hearing on the Rule 32 petition, at which time Zonnie Weaver, Mark Weaver, and their respective trial attorneys, Ed Tibbetts and Robert Clark, testified. (Doc. 12, Ex. 5 at 2, hearing transcript). On March 20, 2000, the state circuit court denied the Rule 32 petition for relief. (Doc. 12, Ex. 5 at 185, Case Action Summary; Doc. 12, Ex. 5 at 335, Order). Zonnie Weaver appealed the denial of his Rule 32 petition to the Alabama Court of

Criminal Appeals on April 17, 2000.[8] (Doc. 12, Ex. 5 at 338, Notice of Appeal).

18. On May 25, 2000, Weaver filed a habeas petition in this Court, which the Court dismissed without prejudice on January 25, 2001, for failure to exhaust claims which were then pending in Weaver's Rule 32 petition before the Alabama Court of Criminal Appeals. *See Weaver v. Jones*, 2001 WL 102401 (S.D. Ala. 2001).

19. On June 22, 2001, the Alabama Court of Criminal Appeals affirmed the circuit court's denial of Weaver's Rule 32 petition for relief and, on July 20, 2001, overruled Weaver's application for rehearing, issuing a certificate of judgment of affirmance on August 8, 2001. (Doc. 12, Ex. 11 at 2, Order; Doc. 12, Ex. 15, Order; Doc. 12, Ex. 20, Order). Zonnie Weaver filed a petition for a writ of certiorari with the Alabama Supreme Court on August 6, 2001, which that court dismissed on August 8, 2001, as untimely filed. (Doc. 7 at 19, habeas petition; Doc. 12, Ex. 18, Order).

20. Weaver then filed the instant petition for a writ of habeas corpus in this Court on August 15, 2001.[9] (Doc. 1, petition).

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8. Although the Alabama Court of Criminal Appeals initially dismissed the appeal as untimely filed, the court granted Weaver's motion to reinstate the appeal on June 12, 2000. (Doc. 12, Ex. 5 at 339, Order).

9. Although Weaver filed the instant habeas petition on August 15, 2001(Doc. 1), the petition did not bear the original signature of

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21. On January 29, 2002, the Alabama Supreme Court issued an order reinstating Weaver's petition for certiorari review, prompting Weaver to file a request for a stay of these habeas proceedings on February 25, 2002, until the state court petition for a writ of certiorari could be concluded. (Doc. 13, Motion to Stay). This Court granted the requested stay on February 28, 2002. (Doc. 14, Order). The Alabama Supreme Court denied Weaver's petition for certiorari review on March 8, 2002. (Doc. 15, Ex. B, Order).

22. Weaver's habeas corpus petition is, therefore, again before this Court. In the instant petition, Zonnie Weaver asserts the following claims as bases for federal habeas relief: (1) ineffective assistance of trial counsel, Ed Tibbetts (Doc. 7 at 20-84, habeas petition); (2) ineffective assistance of appellate counsel, Bob Clark (*Id.* at 85-107); (3) insufficient evidence to support his burglary conviction (*Id.* at 107-08); and (4) violation of his Fourteenth Amendment right to equal protection through prospective application of the May 25, 2000, amendment to the Habitual Felony Offender Act. (*Id.* at 108-09).

For the reasons discussed below, the Court finds that Weaver's petition is due to be dismissed. The Court will consider each of his claims in turn.

(Cont'd)

petitioner's counsel. Accordingly, the Court ordered Weaver to refile his petition with the appropriate signature, which Weaver did on September 17, 2001. (Doc. 7). References in this opinion to the instant habeas petition refer to Document 7.

Appendix D

CONCLUSIONS OF LAW

Claim I.

1. Weaver first argues in his petition that he is entitled to relief under § 2254 on the basis of ineffective assistance of trial counsel, Ed Tibbetts ("Tibbetts"). (Doc. 7 at 20-84, habeas petition). Weaver's numerous ineffective assistance of counsel claims against Tibbetts can be broken down into the following categories:

(a) failure to participate at trial;[10]

(b) failure to conduct meaningful pretrial investigation and to file appropriate pretrial motions;[11] and

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10. This includes failing to object to prosecutorial misconduct in commenting on the grand jury's failure to indict Fred Kelly, vouching for prosecution witnesses, and appealing to the jury's emotions (Doc. 7 at 60-63, habeas petition); failing to submit jury charges and object to erroneous or missing instructions (*Id.* at 63-76); failing to question the jury venire about their knowledge of the case prior to trial; failing to point out inconsistencies between the State's promised evidence and the evidence actually produced; failing to point out inconsistencies in the testimony of the State's witnesses; failing to point out the non-credibility of the State's witnesses; failing to cross-examine prosecution witnesses about their motives to lie; and failing to argue insufficiency of State's evidence. (*Id.* at 49-60).

11. This includes failing to file a motion in limine concerning the grand jury's actions related to Fred Kelly (Doc. 7 at 33, habeas petition); failing to file a motion for production of all physical evidence and to compel the same, including the knife, James' jacket,

(Cont'd)

(c) failure to advise petitioner and to raise proper objections concerning issues of joint trial, prior convictions, right to testify, and Alabama's Habitual Felony Offender Act.[12]

2. In his Rule 32 petition before the state circuit court, Weaver raised the same ineffective assistance claims asserted against Tibbetts here. (Doc. 12, Ex. 5 at 212-296, 318-24, Rule 32 petition). In reaching its decision to deny Weaver's Rule 32 petition, the state circuit court considered the claims on the merits, finding that Tibbetts' representation was not ineffective and stating in pertinent part:

A hearing was held on the application for relief under Rule 32. The petition is denied. . . .

(Cont'd)

videotaped statements, blood evidence, and DNA evidence (*Id.* at 43-46); failing to obtain essential documents, including Zonnie, Mark, and Ammon Weaver's medical records, and James' medical records (*Id.* at 46-48); failing to file essential pretrial motions to obtain criminal records of the prosecution's witnesses and grand jury testimony, failing to file a pretrial motion to sequester witnesses from the courtroom, and failing to file a pretrial motion for a change of venue. (*Id.* at 40-43).

12. This includes failing to explain Alabama's Habitual Felony Offender Act; failing to distinguish Zonnie's case in opening remarks; failing to prepare Zonnie to testify (Doc. 7 at 49-60, habeas petition); failing to provide case law at sentencing to aid in the interpretation of the Habitual Felony Offender Act and the application of prior convictions of more than ten years (*Id.* at 78-79); and failing to argue the unconstitutionality of the Habitual Felony Offender Act. (*Id.* at 79-81).

Appendix D

1. The court finds that counsel was not ineffective in his investigation of the scene, the evidence, or the witnesses or in his efforts to obtain, secure or introduce evidence or witnesses.

2. The court finds that counsel was not ineffective in cross examination of the State's witnesses and in arguing the case to the jury.

3. The court finds that counsel fully advised his client about the ramifications of his four prior felony convictions with respect to the giving of testimony and with respect to their potential impact upon sentencing if petitioner were convicted as charged, and when plea offers were made; and that counsel made no prejudicial errors in this regard.

4. The court finds that counsel did not make errors during pre-trial or trial proceedings that were prejudicial to the petitioner.

5. The court finds that counsel rendered effective assistance and zealously represented the petitioner throughout all proceedings, conferring with him, advising him, consulting with him, and keeping him fully informed to enable him to make decisions personal to him. The court finds the strategic decision to present a joint defense did not prejudice the petitioner and does not amount to ineffective assistance of counsel.

. . .

Appendix D

> In order to succeed on a claim of ineffective assistance of counsel, the petitioner has the burden to show that "[f]irst, . . counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). Petitioner has failed to meet the burden to show counsel was ineffective under the criteria of Strickland. Accordingly, the petition is denied.

(Doc. 12, Ex. 5 at 335-37, Order).

3. Likewise, in its decision affrming the state circuit court's denial of Weaver's petition for Rule 32 relief, the Alabama Court of Criminal Appeals considered Weaver's ineffective assistance of counsel claims against Tibbetts on the merits, stating in pertinent part:

> The Weavers' numerous ineffective assistance of counsel claims are properly before this Court. We note again that the trial court conducted a lengthy evidentiary hearing at which Mark and Zonnie Weaver and their respective trial counsel, Robert Clark and Ed Tibbetts, testified. The Weavers' Rule 32 counsel, Ronald Sullivan, and Martha Tierney, an assistant district attorney in

> Mobile County, did a good job of exploring the various issues of ineffective assistance of trial counsel that were raised in the petitions. After carefully examining the transcript of the hearing, as well as the briefs and arguments on appeal, and without specifically dissecting each of the Weavers' claims, suffice it to say that we do not find trial counsel's assistance to be constitutionally defective under the standard enunciated in *Strickland v. Washington*, [466] U.S. 668 (1984). There is a strong presumption that counsel's performance was reasonable and adequate, and this court is highly deferential to choices made at trial that are arguably dictated by a reasonable trial strategy. Although it is abundantly clear from the transcript of the evidentiary hearing that Mr. Sullivan would have taken a much different approach in representing the Weavers at trial, the fact that a different approach may have been reasonable under the circumstances does not dictate the conclusion that the approach taken by the Weavers' trial counsel was unreasonable, much less constitutionally deficient. This Court is not interested in grading lawyers' performances; this Court is only interested in whether the adversarial process at trial, in fact, worked adequately. *See Waters v. Thomas*, 46 F.3d 1506, 1511-12 (11th Cir. 1995).

(Doc. 12, Ex. 11 at 2, Order). The Court of Criminal Appeals concluded, as the state circuit court had, that Weaver had failed to establish that Tibbetts' performance was constitutionally deficient under *Strickland*. (*Id.*).

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4. Weaver filed the instant petition for a writ of habeas corpus in this Court on August 15, 2001. (Doc. 1, petition). Therefore, his case is governed by 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA). *See Williams v. Taylor*, 529 U.S. 362, 402 (2000); *Bottoson v. Moore*, 234 F.3d 526, 530 (11th Cir. 2000). As amended, § 2254 now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(l) & (2). The Act, as amended, presumes as correct all determinations of factual issues made by a state court and places the burden upon the petitioner of rebutting such a presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

Appendix D

In *Williams*, the United States Supreme Court held that § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13; *see also Bottoson*, 234 F.3d at 531("In addition, a state court decision involves an unreasonable application of Supreme Court precedent 'if the state court either unreasonably extends a legal principle from

[Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.'").

5. Having carefully considered Claim I of Weaver's habeas petition, this Court finds that Weaver has failed to establish entitlement to relief under § 2254(d)(1). Weaver has failed to show under the "contrary to" clause that the state circuit court or the Alabama Court of Criminal Appeals arrived at a conclusion opposite to that reached by the United States Supreme Court on a question of law or that either court decided the case differently than the Supreme Court did in a previous case presenting a set of materially indistinguishable facts. Moreover, under the "unreasonable application" clause, Weaver has failed to establish that either of these state courts, though recognizing the correct governing principles from the Supreme Court's decisions, unreasonably applied those principles to the facts in this case.

As discussed above, the issues encompassed in Claim I of the instant habeas petition were addressed on the merits by the state circuit court and the Court of Criminal Appeals, and both courts recognized the applicability of *Strickland.* (Doc. 12, Ex 5 at 336-37, Order; Doc. 12, Ex. 11 at 2, Order). In addition, in denying Weaver's Rule 32 petition for relief, both courts reasonably applied the principles outlined in *Strickland* to the facts of the case, finding that Tibbetts had provided Weaver effective assistance. (*Id.*).

6. This Court likewise finds that Weaver did not satisfy the two-pronged standard set forth in *Strickland* with respect to his ineffective assistance of counsel claims against

Tibbetts. In order to establish a claim of ineffective assistance of counsel, a petitioner is required to show: (1) that his attorney's representation fell below "an objective standard of reasonableness" and (2) that a reasonable probability exists that, but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. "Establishing these two elements is not easy: 'the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.'" *Van Poyck v. Florida Dep't of Corrections*, 290 F.3d 1318, 1322 (11th Cir. 2002) (quoting *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995)).

> For assessing a lawyer's performance, *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000) (en banc) *cert. denied*, 531 U.S. 1204, 121 S. Ct. 1217, 149 L. Ed. 2d 129 (2001), sets out the basic law: "Courts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 1314 (internal marks omitted). This presumption of correctness applies when a petitioner is challenging his lawyer's act in not presenting certain mitigating evidence. *See Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994) ("A lawyer's election not to present mitigating evidence is a tactical choice accorded a strong presumption of correctness which is *virtually unchallengeable.*").
>
> . . .

> A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high. "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. Virtually every act or omission of counsel would meet that test." *Strickland*, 104 S. Ct. at 2067. Instead, a petitioner must establish that a reasonable probability exists that the outcome of the case would have been different if his lawyer had given adequate assistance. *See id.* at 2068.

Van Poyck, 290 F.3d at 1322-23 (emphasis in original). When applying the *Strickland* standard, courts "are free to dispose of ineffectiveness claims on either of its two grounds." *Oats v. Singletary*, 141 F.3d 1018, 1023 (11th Cir. 1998).

7. The record reflects that, when they began their representation, Tibbetts and Clark met with the Weaver brothers, investigated the crime scene, and interviewed the police officers involved. (Doc. 12, Ex. 5 at 105-07, hearing transcript). Although, originally, the two cases were separate, the trial court granted the prosecutor's motion to consolidate the cases, over Clark's objections. (*Id.* at 107).

While Weaver expresses dissatisfaction in his petition with virtually every aspect of Tibbetts' representation, including his pretrial investigation and motion practice,[13] his

13. For example, Weaver complains that Tibbetts failed to file appropriate pretrial motions, including a motion to preserve and produce certain physical evidence such as videotaped statements

(Cont'd)

primary focus seems to be on Tibbetts' passive role at trial. Weaver complains that, at trial, Tibbetts failed to make objections and cross-examine witnesses. Indeed, the record reflects that Clark, who served as trial counsel for Mark Weaver, took the lead role for the defense at trial and that Tibbetts, who represented the petitioner, had a much more limited presence in front of the jury. At the Rule 32 hearing, Clark testified that he and Tibbetts had discussed what one another's functions would be and had made a strategic decision to minimize Tibbetts' role at trial, thereby hopefully minimizing the appearance of Zonnie's involvement in the crime. (*Id.* at 99). They further agreed that, when it came time to question witnesses, Tibbetts would tell Clark anything that he wanted him to ask. (*Id.*). The record reflects that Clark conducted thorough cross-examinations of the State's witnesses and raised appropriate objections.[14] At the Rule 32 hearing, Tibbetts testified that he did not ask any questions on cross-examination because Clark had "covered anything

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made by himself and his brother, Mark, and Fred Kelly. (Doc. 7 at 43-46, habeas petition). The record reveals, however, that Tibbetts did file a motion for production of the videotaped statements but that the videotapes had been lost by the district attorney's office. (Doc. 12, Ex. 5 at 105, hearing transcript). Tibbetts secured a ruling from the trial court that no reference to the videotapes, detrimental to the Weavers, would be admitted at trial. (*Id.*).

14. For example, although Weaver complains that Tibbetts failed to object when the prosecutor informed the jury that the grand jury did not indict Kelly for the death of Ammon Weaver, the record reflects that Clark objected to the comment and that the trial court sustained the objection. (Doc. 12, Ex. 1 at 110, trial transcript).

that was supposed to have been covered." (*Id.* at 114). Tibbetts also confirmed Clark's testimony regarding their trial strategy, stating that he and Clark did not wish to increase the size of the trial and "wanted a low profile for Zonnie." (*Id.* at 113, 132).

Weaver also complains that Tibbetts should have sought production of certain items of evidence including the knife, James' jacket, and James' medical records. Although Tibbetts was not asked his reasons for failing to seek production of these and other items of evidence, Clark testified at the Rule 32 hearing that he did not want these items produced because of the risk of prejudice to the defense from "highlighting" the items in front of the jury. (Doc. 12, Ex. 5 at 86-96, 103, hearing transcript). Clark further testified that he did not pursue other evidence, such as DNA evidence and fingerprints, because such evidence either did not exist or would have been unhelpful to the defense. *Id.* at 89-92.

Weaver also claims that Tibbetts failed to inform him of the ramifications of Alabama's Habitual Felony Offender Act and the effect of his prior felony convictions on his sentence. However, Clark testified that, while Tibbetts was present, he informed Zonnie and Mark Weaver that, in light of their prior felony convictions, if they were convicted at trial, they would face life without the possibility of parole. (*Id.* at 66, 102). Clark testified: "I had discussions with Zonnie. I told both of them, you're going to prison and you're going to prison for the rest of your natural life on the face of the planet, I told them that." (*Id.* at 102). Clark further testified that he used "very forceful" language trying to convince the Weavers to take a plea agreement that had been offered by the

prosecution. (*Id.* at 66). According to Clark, he "did everything humanly possible to talk these gentleman (sic) into taking the fifteen split." (*Id.* at 101). Both Clark and Tibbetts testified that Zonnie's response was that he "didn't do anything." (*Id.* at 66, 128). Clark testified that he and Tibbetts explained aiding and abetting to Zonnie and told him that he could be convicted for helping his brothers. (*Id.* at 101). Clark stated: "we did everything but beat them to death and drag them in the courtroom to get them to do that and they just wouldn't do it."[15] (*Id.* at 101-02). Tibbetts confirmed Clark's testimony in this regard. (*Id.* at 127-28).

Weaver also claims that Tibbetts should have argued that the Habitual Felony Offender Act was unconstitutional for violating his Fourteenth Amendment right to due process, the Eighth Amendment proscription against cruel and unusual punishment, and the concept of separation of powers. However, the Alabama courts have consistently rejected constitutional challenges to the Habitual Felony Offender Act on these grounds. *See, e.g., Wooden v. State*, 2000 WL 336957, *3 (Ala. Crim. App. March 31, 2000); *Tyler v. State*, 683 So. 2d 1062, 1064 (Ala. Crim. App. 1995); *Frazier v. State*, 663 So. 2d 1035, 1037 (Ala. Crim. App. 1995), and the cases cited therein.

Finally, Weaver complains that Tibbetts should have advised him of his right to testify and, presumably, should have advised him to testify. However, the record shows that,

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15. The record reflects that Mark Weaver eventually agreed to take the plea agreement; however, the prosecutor made the agreement contingent on both brothers accepting. (Doc. 12, Ex. 5 at 100-02, hearing transcript).

at the time of the trial, Weaver had four prior felony convictions, including two prior felony convictions for burglary. (Doc. 12, Ex. 1, at 373-76, trial transcript). Faced with these prior convictions and the risk of a potentially devastating cross-examination by the State, the decision to keep Weaver off the stand could not be considered unreasonable.

Having reviewed each of the claims made by Weaver against Tibbetts, the Court finds that Weaver has failed to show that Tibbetts' representation fell below "an objective standard of reasonableness" with respect to any of the allegations on which Claim I of the instant habeas petition is based. Therefore, Weaver has failed to satisfy the first prong of the *Strickland* standard. Moreover, even assuming that Tibbetts' representation fell below an objective standard of reasonableness with regard to any of the matters alleged in Claim 1, Weaver has failed to establish that a reasonable probability, exists that, but for those alleged failures, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. Accordingly, Weaver has failed to satisfy the second prong of the *Strickland* standard, as well.

8. Finally, Weaver has failed to establish entitlement to relief under § 2254(dX2) by showing that the decisions of either the state circuit court or the Alabama Court of Criminal Appeals were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. As discussed above, this Court must presume as correct the determinations of all factual issues made by these courts. Weaver has not rebutted that presumption of correctness by clear and convincing evidence. Accordingly, Claim I fails for this reason, as well.

Appendix D

Claim II.

9. Next, Weaver argues in his habeas petition that he is entitled to relief under § 2254 on the basis of ineffective assistance of appellate counsel, Bob Clark ("Clark"). (Doc. 7 at 84-107, habeas petition). Weaver's numerous ineffective assistance of counsel claims against Clark can be broken down into the following categories:

(a) failure to raise on appeal numerous issues concerning prosecutorial misconduct, trial court error, and the unconstitutionality of the Habitual Felony Offender Act;[16]

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16. This includes failing to raise on appeal prosecutorial misconduct; failing to raise the unconstitutionality of the Habitual Felony Offender Statute and the unconstitutional application of the Habitual Felony Offender statute; failing to raise trial court errors including failure to charge the jury on the definition of "dwelling" as an element of offense of burglary and the lesser included offenses of burglary, refusing to allow counsel to inquire into whether James was a known drug salesman, improper participation in in-court identification of defendants, improper comments that trailer was a "dwelling," improper comment that being cheated in drug deal does not justify entering someone's dwelling uninvited, improper instructions concerning the element of intent to commit a felony, improper instructions concerning "deadly weapon," improper instructions concerning "remaining unlawfully" in a dwelling, improper instructions concerning complicity, improperly shifting burden of proof, and improper use of Zonnie's prior convictions in sentencing; and failing to properly research and argue the one claim raised on appeal regarding the trial court's improper comment that being cheated in a drug deal does not justify burglary. (Doc. 7 at 89-107, habeas petition).

(b) failure to raise on appeal the issue of insufficiency of the evidence; and

(c) conflict of interest arising out of Clark's joint representation of Zonnie and Mark Weaver on appeal.

Claims II (b) and (c) concerning insufficiency of the evidence and conflict of interest were not raised by Weaver in his Rule 32 proceedings in state court and, thus, will be addressed separately below. The remaining ineffective assistance of appellate counsel claims set forth in Claim II (a) above were raised and addressed on the merits by the state circuit court and the Court of Criminal Appeals and, thus, will be addressed here.

10. In reaching its decision to deny Weaver's Rule 32 petition, the state circuit court considered the same claims set forth in Claim II (a) above concerning Clark's failure to raise on appeal various issues of prosecutorial misconduct, trial court error, and the unconstitutionality of the Habitual Felony Offender Act. (Doc. 12, Ex. 5 at 325-27, Rule 32 petition). Finding that Clark's representation on appeal was not ineffective with respect to these claims, the circuit court stated in pertinent part:

> . . . 6. The court finds that appellate counsel did not render ineffective assistance of counsel or make errors prejudicial to the outcome of the petitioner's case. In order to succeed on a claim of ineffective assistance of counsel, the petitioner has the burden to show that "[f]irst, . . . counsel's

> performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984). Petitioner has failed to meet the burden to show counsel was ineffective under the criteria of *Strickland.* Accordingly, the petition is denied.

(Doc. 12, Ex. 5 at 336-37, Order).

11. Likewise, in its decision affirming the circuit court's denial of Weaver's petition for Rule 32 relief on the basis of ineffective assistance of appellate counsel, the Alabama Court of Criminal Appeals stated in pertinent part:

> [T]he Weavers have failed to show that their appellate counsel were constitutionally ineffective. Robert Clark served as appellate counsel for the Weavers, along with his law partner, Loyd Copeland. Mr. Tibbetts apparently did not serve as appellate counsel. Mr. Copeland did not testify at the evidentiary hearing. The Weavers argue that appellate counsel should have raised more than one issue on appeal. Again, suffice it to say that the Weavers failed to produce evidence sufficient to overcome the strong presumption that counsel were constitutionally effective.

(Doc. 12, Ex. 11 at 2-3, Order). The Court of Criminal Appeals concluded, as the state circuit court had, that Weaver had failed to establish that Clark's performance on appeal was constitutionally deficient under *Strickland.* (*Id.*).

12. As discussed above, this case is governed by § 2254(d)(1) which requires that a writ may issue only if the state court adjudication resulted in a decision that was contrary to clearly established federal law or involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court. Williams, 529 U.S. at 412-13; *Bottoson*, 234 F.3d at 531. Having carefully considered all of the claims categorized in Claim II (a) above, the Court finds that Weaver has failed to establish entitlement to relief under this section. The record shows that these issues were addressed on the merits by the state circuit court and the Alabama Court of Criminal Appeals, both of which recognized the applicability of *Strickland* and both of which reasonably applied the principles outlined in *Strickland* to the facts of the case-to-find that Clark had provided Weaver effective assistance on appeal. (Doc. 12, Ex. 5 at 336-37, Order; Doc. 12, Ex. 11 at 2, Order).

13. This Court agrees that Weaver has failed to meet the *Strickland* standard inasmuch as he has not shown that Clark's representation on appeal fell below "an objective standard of reasonableness" and that a reasonable probability exists that, but for Clark's unprofessional conduct, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688, 694. While it is true that Clark raised only one issue on appeal, Weaver simply has failed to show that Clark's

failure to raise any of the issues set forth in Claim II (a) above was unreasonable.

For example; Weaver argues that Clark should have raised on appeal the trial court's error in failing to instruct the jury on the definition of "dwelling" as an element of the offense of first degree burglary under *Alabama Code* § 13A-7-5. That section provides in part that: "[a] person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, ..." *Alabama Code* § 13A-7-1 defines dwelling as: "[a] building which is used or normally used by a person for sleeping, living or lodging therein." While the trial court did not define "dwelling" in its instructions to the jury, the record clearly shows that the building in question in this case was a house trailer where the Kellys lived with their children. (Doc. 12, Ex. 1 at 112, 114-115, trial transcript). Given the fact that the definition of dwelling would only have further supported a finding that Weaver was guilty of first degree burglary, Clark's failure to raise the issue on appeal. was not unreasonable.[17]

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17. Another example of the lack of merit of Weaver's claims against Clark is Weaver's claim that Clark was ineffective for failing to raise on appeal the unconstitutionality of the Habitual Felony Offender Act on the basis of Fourteenth Amendment due process, the Eighth Amendment proscription against cruel and unusual punishment, and the concept of separation of powers. As discussed above with respect to Weaver's ineffective assistance claim against Tibbetts, the Alabama courts have consistently rejected constitutional challenges to the Habitual Felony Offender Act on these grounds. *See* discussion, *supra*, at Claim 1. Thus, Clark's failure to raise this issue on appeal likewise was not unreasonable.

The record further reflects that, in the Rule 32 hearing in state court, Clark was never questioned about his reasons for failing to raise these issues on appeal, nor was his law partner, Loyd Copeland, called to testify about what considerations, if any, factored into his decision not to raise these additional issues on appeal, even though it appears that Copeland was the lead appellate counsel. (Doc. 12, Ex. 5 at 65, hearing transcript). Because there are legitimate reasons for declining to raise an issue on appeal (lack of merit, limited chance of success, and appeal strategy to name a few), Weaver must show that, in this case, Clark's failure to raise these issues on appeal fell below "an objective standard of reasonableness" and that a reasonable probability exists that, but for Clark's alleged failures, the result would have been different. *Strickland*, 466 U.S. at 688, 694. As noted above, it is not easy to make this required showing, *Van Poych*, 290 F.3d at 1322, and Weaver again has failed to do so with regard to Claim II (a).

14. In addition, Weaver has not established entitlement to relief on the basis of Claim II (a) under § 2254(d)(2) by showing that the decisions of either the state trial court or the Alabama Court of Criminal Appeals were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. As discussed above, this Court must presume as correct the determinations of all factual issues made by these courts. Weaver simply has not rebutted that presumption of correctness by clear and convincing evidence. Accordingly, Claim II (a) fails for this reason, as well.

15. The Court will now address Weaver's ineffective assistance of appellate counsel claims enumerated in Claims II(b) and (c) above. In his habeas petition, Weaver claims that Clark was ineffective for failing to raise on appeal the issue of insufficiency of the evidence and because of a conflict of interest created by his joint representation of Weaver and his brother, Mark. However, Weaver failed to raise either of these issues on direct appeal or in his Rule 32 petition filed in state circuit court.

Generally, "[b]efore a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). This principle, the "exhaustion doctrine," requires that a state prisoner "give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *Id.* Where a petitioner has failed to exhaust his state court remedies, and those remedies are no longer available to him, that failure matures into a procedural default which will bar federal habeas relief unless either the "cause and prejudice or the fundamental miscarriage of justice exception is established." *Smith v. Jones*, 256 F.3d 1135, 1138-39 (11th Cir. 2001); *see also Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) ("[W]e apply the familiar principle that federal courts may treat unexhausted claims as procedurally defaulted; even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile."); *Alderman v.* Zant, 22 F.3d 1541, 1549 (11th Cir. 1994) ("Pursuant to the doctrine of procedural default, a state prisoner seeking federal habeas corpus relies; who fails to raise his federal constitution[al] claim in state court, or who

attempts to raise it in a manner not permitted by state procedural rules is barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default.").

Alabama law generally requires a criminal defendant to raise a claim of ineffective assistance of counsel in a motion for a new trial in order for that claim to be properly preserved for review upon direct appeal. *Ex parte E .D.*, 777 So. 2d 113, 115 (Ala. 2000) (citing *Ex parte Ingram*, 675 So. 2d 863, 865-66 (Ala. 1996)). However, when a defendant cannot reasonably make such a claim within the 30 days allowed by *Alabama Rule of Criminal Procedure* 24.1(b), the claim may be raised for the first time in a Rule 32 petition. *Id.* In the present case, Weaver could not raise a claim of ineffective assistance of counsel against Clark arising out of his handling of the appeal until after the appeal had concluded. Therefore, Weaver was required to raise any ineffective assistance of counsel claims that he had against Clark in his subsequent Rule 32 petition.

In fact, in his Rule 32 petition, Weaver did assert multiple ineffective assistance of counsel claims against Clark arising out of Clark's handling of the appeal. (Doc. 12, Ex. 5 at 325-27, Rule 32 petition). He simply did not assert the two claims at issue here: that Clark was ineffective for failing to raise insufficiency of the evidence on appeal and because he had a conflict of interest. The Eleventh Circuit has held that a petitioner must raise *all of the instances* of ineffective assistance of counsel initially in state court before they can be raised in federal court. *Footman v. Singletary*, 978 F.2d 1207, 1209 (11th Cir. 1992) ("a habeas petitioner may not

present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously.").

Although Weaver subsequently included these two claims in his brief to the Alabama Supreme Court seeking certiorari review of the circuit court's denial of his Rule 32 petition (Doc. 12, Ex. 17 at 39-41, Brief in Support of Petition for Writ of Certiorari), Alabama law is clear that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." *McLin v. State*, 2002 WL 1397514, * 5 (Ala. Crim. App. June 28, 2002) (not yet released for publication) (refusing to consider petitioner's ineffective assistance of counsel claims omitted from his Rule 32 petition and raised for the first time on appeal of the denial of the Rule 32 petition) (citing *Arrington v. State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997)). Therefore, had the Alabama Supreme Court granted Weaver's petition for certiorari review of the denial of his Rule 32 petition, which it did not, these two issues still would not have been properly before the court for review since they were not raised in the Rule 32 petition.[18] Moreover, Weaver is now barred from raising these claims in state court in any subsequent Rule 32 petition because the claims were

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18. Rule 39(g) of the *Alabama Rules of Appellate Procedure* provides that a writ of certiorari will issue "[i]f the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue." This Court views the Alabama Supreme Court's preliminary consideration of Weaver's petition and denial thereof as merely a procedural determination of lack of "probability of merit" in the petition, not a consideration of the claims on the merits. (Doc. 15, Ex. B, Order).

known to exist at the time that his first petition was filed but were not first raised in that petition. *See Alabama Rule of Criminal Procedure* 32.2(b). Therefore, Weaver's ineffective assistance of counsel claims based on Clark's failure to raise insufficiency of the evidence and conflict of interest are procedurally defaulted, and the burden is on Weaver to establish cause and prejudice for the procedural default.

> 16. In procedural default cases, the cause standard requires the petitioner to show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court. *Murray v. Carrier*, 477 U.S., at 488, 106 S. Ct., at 2645. Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.*, at 486-488, 106 S. Ct., at 2644-45. Once the petitioner has established cause, he must show "'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594, 71 L. Ed. 2d 816 (1982).
>
> Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class

> of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991).

In his habeas petition, Weaver neither alleges nor establishes that any objective factor external to the defense impeded his counsel's efforts to raise Claims II (b) and (c) in state court in his Rule 32 petition, nor does he claim actual prejudice as a result of the default. Therefore, he has failed to establish the cause and prejudice exception with respect to his procedural default of these claims.[19]

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19. Even if this Court were to consider Weaver's ineffective assistance of counsel claim based on Clark's purported conflict of interest, the claim has no merit. Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), which established a two-part test to be used to evaluate whether an attorney is constitutionally ineffective due to a conflict of interest. *See Reynolds v. Chapman*, 253 F.3d 1337, 1342-43 (11th Cir. 2001). "To show ineffectiveness under *Cuyler*, a petitioner must demonstrate: (a) that his defense attorney had an actual conflict of interest, and (b) that this conflict adversely affected the attorney's performance." *Id.* at 1342. To satisfy the "actual conflict" prong, a defendant must show something more than "a possible, speculative, or merely hypothetical conflict." *Id.* at 1342-43. A defendant must "point to specific instances in the record to suggest an actual conflict

(Cont'd)

17. Notwithstanding his failure to establish the cause and prejudice exception, Weaver has asserted in his petition that he is actually innocent of the crime for which he was convicted, burglary in the first degree. A federal court may issue a writ of habeas corpus in extraordinary circumstances in order to avoid a fundamental miscarriage of justice when a constitutional violation has caused the conviction of one who is actually innocent. *McCleskey*, 499 U.S. at 494; *see also Smith v. Murray*, 477 U.S. 527, 537-38 (1986). To establish actual innocence, Weaver must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would have convicted him." *Bousley*

(Cont'd)

or impairment of their interests," and he "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remain(s) hypothetical." *Id.* at 1343. (Citations omitted). Then, assuming that a defendant can demonstrate that his attorney labored under an actual conflict of interest, the defendant must show that this conflict adversely affected the representation that he received. "To prove adverse effect, a defendant needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." *Id.* (Citations omitted).

In the present case, although Weaver alleges that Clark's joint representation of himself and his brother, Mark, on appeal created a conflict of interest, he has completely failed to make the requisite showing under *Cuyler* of an actual conflict of interest that adversely affected Clark's performance. Accordingly. Weaver's claim fails on the merits, as well.

v. United States, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-328 (1995)).

Weaver's innocence argument in this case is based on the alleged insufficiency of the evidence to support his conviction for first degree burglary under *Alabama Code* § 13A-7-5. As discussed above, § 13A-7-5 provides in pertinent part that:

> (a) A person commits the crime of burglary in the first degree if he knowingly and unlawfully enters or remains unlawfully in a dwelling with intent to commit a crime therein, and, if, in effecting entry or while in dwelling or in immediate flight therefrom, he or another participant in the crime: (1) Is armed with explosives or a deadly weapon; or (2) Causes physical injury to any person who is not a participant in the crime; or (3) Uses or threatens the immediate use of a dangerous instrument.

Notwithstanding Weaver's testimony at the Rule 32 hearing in state court and his arguments in the instant habeas petition that he remained in the truck and never entered the Kelly's trailer on the night in question, the testimony at trial was undisputed that Weaver and his brothers, without permission, entered a trailer where the Kellys lived with their children in order to exact revenge on drug dealers they believed to be in the trailer who had sold them fake crack cocaine. Once in the trailer, Ammon and Mark Weaver beat and stabbed Cedric James with a knife while Zonnie Weaver stood by and kept anyone from interfering. The record fully

supports Weaver's conviction for burglary in the first degree, and Weaver has failed to present any new evidence to establish, to the contrary, that he is actually innocent of this crime. The testimony of Weaver and his brother at their Rule 32 hearing that neither of them entered the Kelly's home falls far short of establishing that a constitutional violation has caused Weaver to be convicted of a crime for which he is actually innocent. *McCleskey*, 499 U.S. at 494.

Accordingly, the Court does not believe that its refusal to consider these defaulted claims carries with it the risk of a manifest miscarriage of justice, and Weaver's petition for habeas relief on the basis of Claims II (b) and (c) should be denied.

Claim III.

18. In his habeas petition, Weaver next argues that he is entitled to relief under § 2254 on the basis of insufficiency of the evidence to support his burglary conviction. (Doc. 7 at 107, habeas petition). Like Claims II (b) and (c) above, Weaver failed to raise this issue on direct appeal or in his Rule 32 petition filed in state circuit court; and, as with Claims II (b) and (c), Weaver is now barred from bringing this claim in a subsequent Rule 32 petition in state court. *See Ala. R. Crim. P.* 32.2(a)(5) (barring relief upon any ground which "could have been but was not raised on appeal."); *Ala. R. Crim. P.* 32.2(b) (barring a second or successive petition on any ground that was known at the time that the first petition was heard).

Appendix D

19. As discussed above, where a petitioner has failed to exhaust his state court remedies, and those remedies are no longer available to him, that failure matures into a procedural default which will bar federal habeas relief unless either the "cause and prejudice or the fundamental miscarriage of justice exception is established." Smith, 256 F.3d at 1138-39. Weaver has failed to establish either of these exceptions with respect to this claim.

20. Addressing, first, the cause and prejudice exception, it is true that ineffective assistance of counsel is cause for a procedural default, *McCleskey*, 499 U.S. at 494, and it is true that Weaver has alleged in his petition that his appellate counsel, Robert Clark, was ineffective for failing to raise the issue of insufficiency of the evidence on direct appeal. (Doc. 7 at 90, habeas petition). However, before an ineffective assistance claim can be used to establish cause for a procedural default of another claim, it must first have been presented to the state courts as an independent claim. *Hill v. Jones*, 81 F.3d 1015, 1029 (11th Cir. 1996) (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). A procedurally defaulted ineffective assistance of counsel claim cannot serve as cause to excuse a default of a second claim. *Hill*, 81 F.3d at 1030.

This Court found in considering Claim II (b) above that this ineffective assistance of counsel claim was procedurally defaulted; therefore, it cannot provide the basis for cause to excuse Weaver's default of Claim III. Accordingly, the Court need not address the cause and prejudice exception further.

21. Although Weaver has failed to establish the cause and prejudice exception with respect to Claim III, the Court nevertheless would be obligated to consider this claim if Weaver established that a "fundamental miscarriage of justice" had "probably resulted in the conviction of one who is actually innocent." *Smith*, 477 U.S. at 537-38; *McCleskey*, 499 U.S. at 494. However, as the Court found with respect to Claims II (b) and (c) above, Weaver has failed to present any evidence to establish that he is actually innocent of the crime for which he was convicted. Accordingly, the Court does not believe that its refusal to consider this defaulted claim carries with it the risk of a manifest miscarriage of justice, and Weaver's petition for habeas relief on the basis of Claim III should be denied.

Claim IV.

22. In his petition, Weaver finally argues that he is entitled to relief under § 2254 on the basis that prospective application of the May 25, 2000, amendment to the Habitual Felony Offender Act ("HFOA") violates his right to equal protection under the Fourteenth Amendment. (Doc. 7 at 108-09, habeas petition). Respondent answers that Weaver's claim is without merit and, further, that subsequent legislation eliminating the prospective application requirement of the HFOA amendment has rendered Weaver's claim moot.[20]

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20. Respondent also references a procedural default argument in his answer with respect to this claim, stating: "Respondent makes two observations, without *prejudice to his procedural default argument*. . . ." (Doc. 12 at 9, Respondent's Answer) (emphasis added). This passing reference, which is the sum total of respondent's

(Cont'd)

(Doc. 12 at 9-10, Respondent's Answer). Having considered this claim at length, the Court finds that Weaver's petition for habeas relief on the basis of Claim IV is due to be denied.

23. The record in this case reveals that Weaver was sentenced on June 26, 1997, under the pre-amended, mandatory provisions of subsection (c)(3) of the HFOA, *Ala. Code* § 13A-5-9, which required the state trial judge to sentence Weaver to life imprisonment *without the possibility of parole* because he had been convicted of a Class A felony and had at least three prior non-Class A felony convictions. (Doc. 12, Ex. 5 at 182, Case Action Summary; Doc. 12, Ex. 1 at 373-76, 380-82, trial transcript). On May 25, 2000, the HFOA was amended by Alabama Act No. 2000-759, to give the trial judge the option of sentencing an offender, like the petitioner, to either life imprisonment *or* life imprisonment without the possibility of parole.

Section I of Act No. 2000-759 provides in pertinent part:

> (c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he or she must be punished as follows:

(Cont'd)

discussion of the issue, is insufficient to preserve the defense with respect to this claim. *See, e.g., Holleman v. Duckworth*, 155 F.3d 906, 912 (7th Cir. 1998) (State's "passing reference" to the possibility of procedural default was inadequate and constituted a waiver of the issue).

(1) On conviction of a Class C felony, he or she must be punished by imprisonment for life or for any term of not more than 99 years but not less than 15 years.

(2) On conviction of a Class B felony, he or she must be punished by imprisonment for life or any term of not less than 20 years.

(3) On conviction of a Class A felony, where the defendant has no prior convictions for any Class A felony, he or she must be punished **by imprisonment for life or life without the possibility of parole, in the discretion of the trial court.**

(4) On conviction of a Class A felony, where the defendant has one or more prior convictions for any Class A felony, he or she must be punished by imprisonment for life without the possibility of parole.

(Emphasis added). In the amendatory act, the Alabama legislature specifically provided that the amendment would be prospective only, applying to those cases in which the sentence was not final in the trial court on May 25, 2000, the effective date of the act. *See* Ala. Act No. 2000-759, § 3. The legislature further stated that the amendment could not be construed to "create a right of any person currently serving a term of imprisonment imposed pursuant to Section 13A-5-9 . . . prior to the effective date of this amendatory act to petition the parole board or court for review of his or her sentence based on Section 13A-5-9 . . . , as amended." *Id.*

24. The record in this case reveals that, when the May 25, 2000, HFOA amendment went into effect, Weaver's appeal of the denial of his Rule 32 petition was pending before the Alabama Court of Criminal Appeals. (Doc. 12, Ex. 5 at 185-86). Weaver raised the issue of the unconstitutionality of the prospective application requirement of the May 25, 2000, HFOA amendment to the Court of Criminal Appeals, arguing that the amendment should apply retroactively to him and that, to apply it otherwise, created an arbitrary distinction between persons convicted of the same offense, with identical records of prior conviction, subjecting them to different periods of incarceration depending on the date of their convictions. (Doc. 12, Ex. 8 at 55-56, Appellants' Brief before Alabama Court of Criminal Appeals). Weaver further argued that there was no rational basis for prospective application of the amendment and that the requirement violated his right to equal protection under the Fourteenth Amendment. (*Id.*). On June 22, 2001, the Court of Criminal Appeals affirmed the trial court's denial of Weaver's Rule 32 petition, stating, with regard to this issue, that it could not address the constitutional claim related to the May 25, 2000, HFOA amendment since the claim had not been considered by the trial court.[21] (Doc. 12, Ex. 11 at 2, Order). The court stated:

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21. As Weaver correctly points out, he could not have presented this claim to the state circuit court in his Rule 32 petition because the amendment to the HFOA, on which the claim is based, became effective May 25, 2000, more than two months after the circuit court had denied his Rule 32 petition and while the appeal of that denial was pending in the Court of Criminal Appeals. (Doc. 12, Ex. 5 at 185-86, Case Action Summary; Doc. 12, Ex. 5 at 335-37, Order).

> "An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." *Arrington v. State*, 716 So. 2d 237, 239 (Ala. Crim. App. 1997). Because [petitioner] did not include this claim in [his] petition[], it is not properly before this Court for review.

(*Id.*). The Court of Criminal Appeals overruled Weaver's application for rehearing on July 20, 2001, issuing a certificate of judgment of affirmance on August 8, 2001. (Doc. 12, Ex. 15, Order; Doc. 12, Ex. 20, Certificate of Judgment). On August 6, 2001, Weaver filed a petition for a writ of certiorari with the Alabama Supreme Court (Doc. 12, Ex. 17 at 4, Brief; Doc. 12, Ex. 18, Order), which that court denied on March 8, 2002. (Doc. 15, Ex. B, Order). To date, Weaver has not presented this claim to the state circuit court.

25. Weaver now seeks habeas relief on the ground that the prospective application requirement of the May 25, 2000, HFOA amendment is unconstitutional. (Doc. 7 at 108-09, habeas petition). As discussed above, "[i]n general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (citing 28 U.S.C. § 2254(b)(1)(A)).[22] "Exhaustion of state remedies

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22. 28 U.S.C. § 2254 provides in relevant part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment

(Cont'd)

requires that the state prisoner 'fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'" *Snowden*, 135 F.3d at 735 (citations omitted).

> [I]t is not sufficient merely that the federal habeas applicant has been through the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.

Id.

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. *Rose v. Lundy*, 455 U.S. 509, 515-516, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982); *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 94 L. Ed. 761 (1950).

(Cont'd)

> of a State court shall not be granted unless it appears that—
>
> > (A) the applicant has exhausted the remedies available in the courts of the State. . . .

O'Sullivan, 526 U.S. at 844. A petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

26. Under Alabama Rule of Criminal Procedure 32.1, a defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that "(c) [t]he sentence imposed exceeds the maximum authorized by law or is otherwise not authorized by law." Since Weaver claims that the May 25, 2000, HFOA amendment, if applied constitutionally, would require that the state trial court reconsider his sentence, taking into account the new option of sentencing him to life imprisonment with the possibility of parole, Rule 32.1 (c) arguably would be an appropriate vehicle by which to assert that claim. Moreover, although Rule 32.2(b) precludes "successive" petitions on the same or similar grounds raised in a previous petition, the Alabama courts have held that a petition raising the same ground previously raised in an earlier petition is not "successive" unless the ground was considered on the merits in the previous petition. *See Whitt v. State*, 2001 WL 996849, *5 (Ala. Crim. App. August 31, 2001) (in order for a claim that has been raised in a previous Rule 32 petition to be precluded as successive under Rule 32.2(b), "the claim must have been decided on the merits in the previous petition."). Although Weaver raised this claim before the Court of Criminal Appeals in his previous Rule 32 proceedings, the court refused to consider it; therefore, the claim would not be precluded as "successive."

27. Ordinarily, a mixed petition, such as that involved here containing both exhausted and unexhausted claims, must be dismissed without prejudice, "allowing either resubmission of only exhausted claims or total exhaustion."[23] *Snowden*, 135 F.3d at 736. However, where the State has not raised the petitioner's failure to exhaust as a defense to the claim, as is the case here, it is appropriate for the Court to consider "whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings before reviewing the merits of the petitioner's claim." *Granberry v. Greer*, 481 U.S. 129, 134 (1987). Where it is "perfectly clear that the applicant does not raise even a colorable federal claim," then the interests of all concerned are better served if the Court does not require exhaustion. *Id.* at 135; *see also Allen v. State ofAlabama*, 728 F.2d 1384, 1387 (11th Cir. 1984) ("[i]n this circuit futility of exhaustion is an exception to the exhaustion requirement.").

On June 14, 2002, the Alabama Supreme Court answered the precise legal question raised by Weaver here and found that prospective application of the May 25, 2000, HFOA amendment did not violate the equal protection clause of the Fourteenth Amendment. *See Ex parte Zimmerman*, 2002 WL 1302899 (Ala. June 14, 2002) (not yet released for publication). Given this decision, the Court is convinced that Weaver does not raise even a colorable federal claim and that further resort to state remedies would be futile.

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23. Unlike Claims II (b) and (c) and Claim III above, which also were unexhausted, Weaver still has a remedy in state court with respect to this claim. Therefore, it is not procedurally barred.

Appendix D

In *Zimmerman*, the petitioner, like Weaver, had been sentenced under the preamended § 13A-5-9(c)(3), and, like Weaver, Zimmerman argued that his 1991 sentence of life imprisonment without the possibility of parole as a habitual felony offender violated his right to equal protection given the May 25, 2000, amendment to § 13A-5-9(c)(3). Zimmerman argued that the amendment impermissibly treated Class A felony offenders, with three prior non-Class A felony convictions, differently based on whether the offender's sentence was final in the trial court on May 25, 2000. *Zimmerman*, 2002 WL 1302899, *1.

The court described Zimmerman's equal protection argument as follows:

> [Zimmerman] contends that the prospective application of the amended sentencing statute violates his right to equal protection under the laws by creating a date-based classification that confers the possibility of more lenient sentencing on a class of persons whose sentences were not final as of May 25, 2000, the effective date of the Act, while arbitrarily and inequitably excluding from the possibility of that leniency those persons, like him, whose sentences for offenses of the same nature or seriousness were final before the effective date of the Act.

Zimmerman, 2002 WL 1302899, *2. Quoting the opinion of the Court of Criminal Appeals in the case, the Alabama Supreme Court rejected Zimmerman's argument, stating:

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"Under the well-recognized rule, Zimmerman's argument has no merit. '[A] reduction of sentences only prospectively from the date a new sentencing statute takes effect is not a denial of equal protection.' 16B C.J.S. *Constitutional Law* § 777 (1985). *See also Arthur W. Campbell, Law of Sentencing* § 8:6 (2d ed. 1991) ('It has been ruled equal-protection principles [do not] require retroactive application of a newly enacted statute which would lessen sentencing sanctions. . . .'). *See, e.g., Mirenda v. Ulibarri*, 351 F. Supp. 676 (CD. Cal. 1972); *In re Moreno*, 58 Cal. App. 3d 740, 743, 130 Cal. Rptr. 78, 80 (1976) ('Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons whose convictions were final before the effective date of the ameliorative amendment.'); *Carter v. State*, 512 N.E.2d 158, 170 (Ind. 1987) ('Because Carter was charged, tried, and sentenced before the amendment went into effect, it was not a denial of equal protection to sentence Carter according to the statute in effect at that time.'); *Bowen v. Recorder's Court Judge*, 384 Mich. 55, 179 N.W.2d 377 (1970); *Burch v. Tennessee Dep't of Correction*, 994 S.W.2d 137 (Term. Ct. App. 1999). Where legislation confers a benefit not previously provided and is effective on a certain date, the apparent inequity results from all such ameliorative legislation and has been held not to deny equal protection. *Jackson v. Alabama*, 530 F.2d 1231, 1238 (5th Cir. 1976). *See also Brooks v. State*, 622 So. 2d 447, 449 (Ala. Crim. App.

1993) ('A prisoner sentenced under an earlier, less favorable sentence reduction statute generally has no right to complain of the ameliorative provisions of a later good-time statute.').

. . .

'This is of necessity the result of any new law which is to go into effect at and on a certain date. The seeming inequity in fixing a cut-off date is outbalanced by the factors of reliance and burden on the administration of justice which argue for prospective application only. *Stovall v. Denno*, 388 U.S. 293, 300-301, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 . . . (1967).' *See also Jackson v. Alabama*, 530 F.2d at 1238 ('the "factors of reliance and burden on the administration of justice," *Stovall v. Denno* [, 388 U.S. 293, 300, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967)], outweigh the apparent inequity in determining a fixed cutoff date'); . . . *People v. Grant*, 71 Ill. 2d 551, 562, 17 Ill. Dec. 814, 377 N.E.2d 4, 9 (1978) (avoiding remand for additional sentencing hearings is a reasonable basis for the Legislature's distinguishing between those defendants who had not yet been sentenced prior to the effective date of the amendatory act and those, on the other hand, whose sentences had been imposed before the effective date); *Burch v. Tennessee Dep't of Correction*, 994 S.W.2d at 139 (the preservation of the deterrent effect that arises from allowing sentences that have already been imposed to remain unchanged is a legitimate state

> interest); *State ex rel. Stewart v. McWherter*, 857 S.W.2d 875, 877 (Term. Crim. App. 1992) (a compelling state interest exists in preserving the finality of criminal litigation resulting in a conviction and sentence which were valid at the time of their imposition).
>
> . . .
>
> Some courts have resolved the issue of the effect of an amendatory act by statutory construction. . . . [Citations omitted]. 'We see no constitutional question involved in this case. The fact that the legislature reduces the penalty for a crime after a prisoner is sentenced, and he does not benefit from that mitigation of punishment, does not constitute an arbitrary classification or deny the prisoner equal protection of the law. . . . *Bradley v. United States*, 410 U.S. 605, 93 S. Ct. 1151, 35 L. Ed. 2d 528 . . . (1973).'"

Zimmerman, 2002 WL 1302899, *2-4. The Alabama Supreme Court concluded:

> "'Equal protection is not denied where an amendatory statute reducing a penalty is not applied to persons whose convictions were final before the effective date of the ameliorative amendment. (*Jones v. Cupp* (9th Cir. 1971) 452 F.2d 1091.) The only requirement is that 'classifications between those to whom the state accords and withholds

> substantial benefits must be reasonably related to a legitimate public purpose.' [Citations omitted]."
>
> The disparity of which Zimmerman complains does not run between classes of persons whose situations are indistinguishable. Zimmerman was sentenced under § 13A-5-9(c)(3) and his sentence became final before the May 25, 2000, amendment became effective. He is being treated similarly to all other offenders sentenced under the law in effect at the time he was sentenced. More importantly, the State has a legitimate interest in seeking to ameliorate the perceived harshness of the Habitual Felony Offender Act and a strong concomitant interest in maintaining the finality of judgments and "'assur[ing] that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.'" [Citations omitted]. The prospective application of a sentencing statute — which may result in the punishment of offenders based upon the date of final judgment — is reasonably related to these legitimate State interests and does not violate an offender's right to equal protection. The judgment of the Court of Criminal Appeals is affirmed.

Zimmerman, 2002 WL 1302899, *4-5.

Given the Alabama Supreme Court's sound rejection of the precise claim made by Weaver in this case, no reasonable possibility exists that Weaver could obtain relief from the

state court on the basis that the prospective application requirement of the May 25, 2000, HFOA amendment violates the equal protection clause of the Fourteenth Amendment. As such, it would serve no purpose to require further exhaustion of this claim in state court.

28. Therefore, considering Weaver's claim on the merits, this Court agrees with the Alabama Supreme Court in *Zimmerman*, and the cases cited therein, that prospective application of the May 25, 2000, amendment to the HFOA does not violate the equal protection clause of the Fourteenth Amendment. *See, e.g., United States v. Sorondo*, 845 F.2d 945, 948 (11th Cir. 1988) (rejecting appellant's constitutional arguments, including an equal protection challenge, that Congress could not enact a provision which mitigated the effect of a prior sentencing provision unless the new law was given retroactive effect, stating: "Congress is certainly empowered to pass laws which lessen the severity of previous sentencing provisions, and it need not do so retroactively."). Because this claim is without merit, it does not warrant habeas relief. Therefore, Weaver's petition for a writ of habeas corpus on the basis of Claim IV should be denied.[24]

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24. Respondent also argues in his answer that the Alabama legislature subsequently eliminated the prospective application requirement of the May 25, 2000, HFOA amendment, thereby rendering Claim IV of Weaver's petition moot. Unfortunately, respondent neglected to adorn his argument with citation to any authority. Therefore, the Court will assume that he is referring to Act No. 2001-977, which became effective August 28, 2001, and provides:

> The provisions of Section 13A-5-9 of the Code of Alabama 1975, shall be applied *retroactively* by the

(Cont'd)

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CONCLUSION

Based on the foregoing, the undersigned Magistrate Judge is of the opinion that the petitioner's rights were not violated and that his request for habeas corpus relief should be denied.

The attached sheet contains important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this the 23rd of July, 2002.

s/ William E. Cassady
WILLIAM E. CASSADY
UNITED STATES MAGISTRATE JUDGE

(Cont'd)

> sentencing judge or presiding judge for consideration of early parole of each non-violent convicted offender based on evaluations performed by the Department of Corrections and approved by the Board of Pardons and Paroles and submitted to the court.

(Emphasis added). Assuming that this is the legislation to which respondent refers, it is far from clear whether the act requires the state circuit court to apply the May 25, 2000, HFOA amendment retroactively to Weaver, thereby rendering Claim IV moot. In any event, because the Court has otherwise determined that Weaver is not entitled to habeas relief on the basis of Claim IV, it need not address this argument.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR A CERTIFICATE OF APPEALABILITY DATED AND FILED FEBRUARY 13, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-15844-C

ZONNIE WEAVER,

Petitioner-Appellant,

versus

CHARLIE JONES,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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Before TJOFLAT and BIRCH, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated December 20, 2002, denying a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).